IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.9 OF 2006

1. Sopana Rambhau Musale, Adult,)
Occupation Agriculturist.)

2. Hari Rambhau Musale, Adult,)
Occupation Agriculturist, both residing)
at Village Mhase, Taluka Shirur,)
District Pune.) ... Petitioners

Vs.

Baban Bhagwanta Khade, Adult,)
Occupation Agriculturist, residing at Village)
Mhase, Taluka Shirur, District Pune.) ... Respondent

Mr. B.G. Vaidya i/b M/s. Shelke & Co. for the petitioners.

Mr. V.B. Tapkir for the respondent.

CORAM : A.M. KHANWILKAR, J.

DATED : 13TH JULY, 2006.

ORAL JUDGMENT :-

1. Heard counsel for the parties.

2. Rule. Mr. Tapkir waives notice for the respondent. As a short question is involved, the application is heard finally, forthwith, by consent.

3. This application takes exception to the judgment and order passed by

the Joint Civil Judge, Junior Division, Ghodnadi, dated 22/12/2005 below Ex-1 in Regular Darkhast No.14 of 2004.

4. Indeed this is an unfortunate case where the petitioners having succeeded in getting the decree in their favour, are not in a position to enjoy the fruits of the decree having failed to institute execution proceedings within the specified time.

5. Briefly stated, the petitioners (original defendants) took loan from one Mr. Bhagwanta Jijaba Khade, the father of the respondent. It is the case of the petitioners that the said Bhagwanta was a money lender and against the loan offered to the petitioners, security of the ancestral land bearing Gut No.147 admeasuring 7 Hectors 65 Aares from Village Mauje Mhase, Taluka Shirur, District Pune, was given by executing a registered agreement for sale for consideration of Rs.7,000/-. In otherwords, the case of the petitioners is that the transaction between the parties was plainly a money lending transaction. It is also the case of the petitioners that the petitioners repaid the said loan amount with interest at the rate of 6% per month. Notwithstanding this, the respondent through his next friend Ms. Sitabai Bhagwant Khade filed Regular Civil Suit No.84 of 1977 in the Court of Civil Judge, Junior Division, Ghodnadi against the petitioners for specific performance of the purported agreement for sale of the land and in the alternative for refund of consideration paid with interest. The trial court on considering rival stand, accepted the claim of the petitioners and proceeded to

dismiss the suit by judgment and decree dated 9/2/1981 and passed the following order :

"ORDER

The Defts. to refund Rs.6,500/- to the Plff. within one month of date of this Order. On refund of the amount the Plff. to hand over possession of the suit land to the Defts.

The Defts. to bear their own costs and to pay one costs of the Plff."

6. Against this decision, the respondent carried the matter in appeal before the District Court, Pune at Pune, being Civil Appeal No.164 of 1981. It is not in dispute that there was no stay to the decree passed by the trial court during the pendency of this appeal. The appeal was dismissed by the judgment and decree dated 27/8/1982 when the following order came to be passed.

"ORDER

The appeal is dismissed with the costs of Respondents-Defendants on the Appellant-Plaintiff. The Appellant-Plaintiff to bear his own costs."

7. Against this decision, the respondent carried the matter further before

this court by way of Second Appeal No.500 of 1982. Even during the pendency of second appeal, there was no stay to the subject decree. The second appeal came to be dismissed on 30/9/1993. The order passed therein reads thus:

> "Heard.
>
> No question of Law needing interference in Second Appeal exists.
>
> Dismissed.
>
> No costs."

8. It is seen that the petitioners filed darkhast application / execution proceedings before the executing court only on 8/6/2004. Thereafter, on 4/9/2004, the petitioners deposited the amount specified by the trial court in its order dated 9/2/1981, which was accepted vide Receipt No.22, Book Serial No.26. It is also seen that no application was filed by the petitioners in any of the court for extension of time to deposit the amount as specified by the order of the trial court dated 9/2/1981.

9. In this background, the respondent raised objection before the executing court regarding the maintainability of the execution proceedings. According to the respondent, the execution proceedings were instituted by the petitioners after the period of limitation. In that, decree was passed on

9/2/1981 and became enforceable on and from that day on account of which the period of limitation for taking out execution proceedings started running. Whereas, the execution proceedings were instituted only on 8/6/2004. The petitioners, on the other hand, contended that the period of limitation of execution commenced from the date of dismissal of the second appeal on 30/9/1993. The execution application having been filed on 8/6/2004 was, therefore, within limitation. It was the case of the petitioners that the decree as passed by the trial court merged in the decision of this court which dismissed the second appeal against the said decree on 30/9/1993, for which reason the execution application as filed was within the period of limitation.

10. The executing court considered the rival submissions and answered the issue of limitation against the petitioners. The executing court by the impugned judgment and order dated 22/12/2005, has, in substance, found that the petitioners were directed to refund the sum of Rs.6,500/- within one month from 9/2/1981, which obliged the petitioners to deposit that amount in court within the specified period. Besides, as there was no extension of time for depositing the amount, granted by any competent court, deposit made by the petitioners on 4/9/2004 was of no avail. The lower court has held that the execution proceedings instituted by the petitioners were time barred and accordingly dismissed the same. The correctness of this decision is put in issue before this court.

11. According to the petitioners, the executing court has completely

misdirected itself in dismissing the execution proceedings as being barred by limitation. This is so because the petitioners could have filed execution proceedings only after the dismissal of the second appeal by this court and not during the period when the correctness of the said decree was put in issue before the appellate courts. It is well settled contend the petitioners, that the decree of the subordinate court merges in the decree passed by the appellate court and it is from the date when the appellate court finally decides the matter the cause for instituting execution proceedings will arise for the concerned parties. Counsel for the petitioners has placed reliance on two decisions to buttress the above submission. Reliance is placed on the decision of the Apex Court in the case of ***Mahanth Ram Das v. Ganga Das reported in AIR 1961 SC 882***. Reliance is also placed on the decision of the Rajasthan High Court in the case of ***Sayed Abdul Rauf v. Nurul Hussain & Ors., reported in AIR 1992 RAJASTHAN 3***.

12. Counsel for the respondent, on the other hand, has supported the conclusion reached by the lower court that the execution proceedings were filed beyond time. Reliance is placed on the decisions of the Apex Court by the counsel for the respondent, in the case of ***Naguba Appa v. Namdev, reported in AIR 1954 SC 50***; in the case of ***Sulleh Singh and others v. Sohan Lal & Another, reported in AIR 1975 SC 1957***; in the case of ***P.K. Kutty Anuja Raja & Another v. State of Kerala & Another reported in (1996) 2 SCC 496*** and in the case of ***Vareed Jacob v. Sosamma***

Geevarghese & Others, reported in (2004) 6 SCC 378. Reliance is also placed on two decisions of the High Courts in the case of ***Purushottam and another v. M/s. Nag Vastra Bhandar reported in AIR 1979 Bombay 60*** and in the case of ***Kali Prasad Bajpayee and Ors. v. Bhagwat Prasad and Anr. reported in AIR 1980 Pat. 280.***

13. Having considered the rival submissions, I shall first refer to the definition of the word "decree" as postulated in sub-section (2) of section 2 of the Code of Civil Procedure. The same reads thus :

> "(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default."

14. Section 51 of the CPC empowers the court to enforce execution subject to such conditions and limitations as may be prescribed, on the application of the decree holder. It is well settled that the expression "limitation as may be prescribed" will take within its fold the statutory

requirement of filing execution proceedings within the period of limitation prescribed by the Limitation Act of 1963. There can be no doubt that in view of the express provision in the CPC regarding the manner and procedure for execution of the decree, it is not open for the court to invoke its inherent power under section 151 of the CPC. For, the court cannot exercise its inherent power in conflict with the express provisions of law. The next aspect which needs to be addressed is, what is the time period specified for execution of any decree. That can be answered by straight away adverting to section 2(j) of the Limitation Act. Section 2(j) defines the expression "period of limitation". The same reads thus :

> "(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act."

15. To ascertain as to what is the period of limitation provided in the Schedule insofar as execution of any decree, reference can be usefully made to Article 136 of the Limitation Act, which reads thus:

	Description of application	Period of limitation	Time from which period begins to run
136	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years.	[When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place : Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

16. From the plain language of Article 136 of the Limitation Act, it is seen that the limitation period of twelve years, provided for execution of any decree or order of any civil court, starts running firstly from the date when the decree or order becomes enforceable. Indeed, Article 136 of the Limitation Act also provides that where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place. The question that needs to be

posed is, when the decree or order becomes enforceable. From the language of Article 136 of the Limitation Act read with provisions of CPC, it is abundantly clear that the decree and order becomes enforceable from the date when the same is passed. This position emerges on conjoint reading of Article 136 with the definition of "decree" in section 2(2) of the CPC as also Rule 5 of Order XLI of the CPC. The reference to Rule 5 of Order XLI of CPC will have to be made as it is a provision which expressly provides that filing of appeal in the appellate court against any decree passed by the trial court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order in that behalf for sufficient cause for stay of the execution of such decree. Rule 5 of Order XLI reads thus :

> **Rule 5 - Stay by Appellate Court** -– (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause order stay of execution of such decree.

17. In my opinion, the respondent is justified in contending that mere filing or institution of the appeal before the appellate court will not come to the aid of decree-holder (the petitioners in this case) nor it will stop the running of the limitation period. The respondent has rightly pressed into service decisions of the Apex Court to buttress this position. In the case of ***Naguba Appa' s case***

(supra), the Apex Court was dealing with a suit where the decree for pre-emption of the property passed in favour of the plaintiff provided for deposit of the sale price within two months from the date of the decree. That order was not complied with. The matter was, however, carried in appeal against the decree, which was later on withdrawn. Thereafter, the pre-emptor made an application to the court for making the deposit without disclosing that the time fixed for the deposit had elapsed. The Apex Court rejected the argument of the pre-emptor and held that the amount could not have been accepted after the time specified by the decree. It is clearly held that mere filing of an appeal does not suspend the decree of the trial court and unless that decree is altered in any manner by the court of appeal, the pre-emptor was bound to comply with its directions.

18. Reliance is also justly placed on the decision in the case of ***Sulleh Singh's case (supra)***. Even in this case, a suit for possession by pre-emption of the land was instituted. In this case, the plaintiffs-respondents did not deposit the decretal amount within the specified time provided in the decree. The Apex Court, following its earlier decision in ***Naguba Appa' s case (supra)*** accepted the claim of the appellants therein that not depositing the amount within the specified time provided in the decree resulted in dismissal of the suit for possession by pre-emption. In paragraph 15 of this decision, the Apex Court has taken the view that it is only if the plaintiffs-respondents had paid the decretal amount within the time granted by the trial court or if the

plaintiffs/respondents had obtained another order from the lower appellate court granting any order of stay that the lower appellate court might have considered the passing of appropriate order in favour of pre-emptors. It is further held that the High Court should have allowed the appellant's appeal and not made any distinction in dismissing plaintiff-respondent Nathi's suit and allowing plaintiff-respondent Sohan Lal any extension of time to make the payment.

19. Reliance is also rightly placed on the decision in the case of ***P.K. Kutty Anuja Raja' s case (supra)***. The Apex Court took a view that the limitation of taking out execution proceedings would commence from the date when the order was passed in favour of a party by the competent court and the knowledge of mistake of law cannot be countenanced for extending time so as to overcome the period of limitation. Even in the case of ***Vareed Jacob' s case (supra)***, decided by the Apex Court, the Apex Court answered the issue in favour of the respondent. In that case, the question that arose for consideration before the Apex Court was, whether on the restoration of the proceedings, which were dismissed for default, it would revive the interlocutory order which was passed in such proceedings. The Apex Court has noted the distinction regarding the interlocutory orders passed under the provisions of Order XXXVIII and under Order XXXIX of the CPC. Insofar as interlocutory order passed under Order XXXIX of CPC is concerned, the Apex Court has taken a view that the same gets revived on restoration of the

proceedings. Applying that principle, the majority decision proceeded to hold that though final decree was passed on 25/6/1969, the same could not be put in execution because of pendency of another suit and interlocutory order passed therein between 1969 upto 21//3/1975. Giving benefit of that period the court proceeded to hold that the execution petition as filed in that case on 18/3/1981 was within the period of limitation.

20. Reliance is also rightly placed on the decision of our High Court in the case of ***Purushottam' scase (supra),*** which has restated the settled position of law that the decree made by the competent court would not stand suspended merely by reason of filing of the appeal.

21. Reliance is lastly placed on the decision of the Patna High Court in the case of ***Kali Prasad Bajpayee' scase (supra)***. In this decision, marked difference between the provisions of Article 182 of the old Limitation Act in contra-distinction to import of Article 136 of the present Limitation Act has been noted. The Patna High Court has taken a view that filing of an appeal by the claimant was of no consequence as there was no stay of the order and in terms of the decree passed against them, the limitation period was running for the purpose of taking out execution proceedings.

22. On the analysis of relevant provisions and decisions, which are pressed into service on behalf of the respondent, I have no hesitation in taking

a view that the conclusion reached by the executing court that the execution proceedings taken out by the petitioners in the fact situation of the present case were barred by limitation. In the present case as has been noted earlier, there was no stay to the decree passed by the trial court at any stage nor the competent court has modified the decree so as to extend the time to deposit the amount in favour of the petitioners. If the argument of the petitioners that the decree of the trial court merges with the decree of the appellate court was to be accepted even in that case, it is to be noted that the amount came to be deposited by the petitioners in the execution court only on 4/9/2004, which is not within one month from the date of order of this court dismissing the second appeal on 13/9/1993. There is nothing on record to indicate that the petitioners had moved any competent court for extension of time to deposit the amount before the specified time had expired. It would have been another matter if the competent court on such application was to grant further time to the petitioners for depositing the amount. That has not happened in the present case. In otherwords, requisite amount has not been deposited in time nor any attempt was made to get the time extended within the prescribed period. Besides, the period of limitation for taking out execution proceedings was running on and from 9/2/1981. The first part of Article 136 would, therefore, apply to the present case. Later part of Article 136 would have come into play if the competent court was to extend the time to deposit the decretal amount in favour of the petitioners. In such a case, it is not possible to exercise inherent powers of this court under section 151 of the CPC as that would result in passing orders in conflict with the statutory provisions.

23. Counsel for the petitioners, however, relied on the decision of the Apex Court in the case of ***Mohanth Ram Das ' case (supra)***. This decision is of no avail to the petitioners, having regard to the fact situation of the present case. In that case, the party had applied for extension of time before the period specified in the order to deposit the amount had expired. The Apex Court found that the application was wrongly rejected by the lower court. Whereas, according to the Apex Court, the said application deserved to be allowed. On that finding, the Apex Court has proceeded to answer the issue that was before it. It will be apposite to reproduce the exposition in paragraph No.5 of the said judgment. The relevant portion of paragraph No.5 of the said judgment reads thus :

> *"The short question is whether the High Court, in the circumstances of the case, was powerless to enlarge the time, even though it had peremptorily fixed the period for payment. If the Court had considered the application and rejected it on merits, other considerations might have arisen; but the High Court in the order quoted, went by the letter of the original order under when time for payment had been fixed. Section 148 of the Code, in terms, allows extension of time, even if the original period fixed has expired, and S. 149 is equally liberal. As fortiori, those sections could be invoked by the applicant, when the time had not actually expired. That the application was filed in the vacation when a Division Bench was not sitting should have been considered in dealing with it even on July 13, 1954, when it was actually heard. The order, though passed after the expiry of the time fixed by the original judgment, would have operated from July 8, 1954. How undesirable it is to fix time peremptorily*

> *for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be expedient. Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this kind to have resorted a suit or proceeding, even though a final roder has been passed. We need cite only one such case, and that is Lachmi Narain Marwari v. Balmakund Marwari, ILR 4 Part 61 : (AIR 1924 PC 198). No doubt, as observed by Lord Phillimore, we do not wish to place an impediment in the way of Courts in enforcing prompt obedience and avoidance of delay, any more than did the Privy Council. But we are of opinion that in this case the Court could have exercised its powers first on July 13, 1954, when the petition filed within time was before it, and again under the exercise of its inherent powers, when the two petitions under S. 151 of the Code of Civil Procedure were filed. If the High Court had felt disposed to take action on any of these occasions. Ss. 148 and 149 would have clothed them with ample power to do justice to a litigant for whom it entertained considerable sympathy, but to whose aid it erroneously felt unable to come."*

24. As mentioned earlier, this decision is of no avail to the fact situation of the present case as the decree passed by the lower court was not stayed by any competent court at any point of time nor the subsequent order passed by

the appellate courts granted further time to the petitioners to deposit the amount. In fact, no formal prayer or application was made by the petitioners within the specified time before the competent court for granting further time to deposit the amount in terms of the decree passed by the lower court.

25. The petitioners had also relied on the decision in the case of ***Sayed Abdul Rauf's case (supra)***. The Rajasthan High Court in this case was considering the issue as to whether the execution application was barred by time having been preferred after three years of dismissal of the second appeal for default by the order of the appellate court. The argument was that the order of dismissal of second appeal for default was not a decree and, therefore, the period of limitation cannot be reckoned from the date of order of the High Court but that of the subordinate court. The Rajasthan High Court in paragraph No.11 of its judgment has referred to the principle of doctrine of merger. In paragraph No.9 of its decision, the Rajasthan High Court has reproduced the reasons recorded by the Law Commission for recommending introduction of Article 136 of the present Limitation Act. On reading the said reasons, the argument which is now canvassed on behalf of the petitioners if accepted would be reverting to the position which prevailed prior to introduction of Article 136 of the present Limitation Act. The relevant portion of the reasons as recorded by the law Commission would read thus :

> *"In our opinion, the maximum period of limitation for the execution of a decree or order of any Civil Court*

> *should be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree) or where the decree of subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. There is, therefore, no need for provision compelling the decree-holder to keep the decree alive by making an application every three years. There exists a provision already in S. 48 of the Civil P.C. that a decree ceases to be enforceable after a period of 12 years. In England also the time fixed for enforcing a decree is 12 years. Either the decree-holder succeeds in realising his decree within this period or he fails and there should be no provision enabling the execution of a decree after that period. To this provision an exception will have to be made to the effect that the Court may order the execution of a decree upon an application presented after the expiration of the period of 12 years, where the judgment-debtor has, by fraud or force prevented the execution of the decree at some time within the twelve years immediately preceding the date of the application. S. 48 of the Civil Procedure Code may be deleted and its provision may be incorporated in this Act."*

26. It is to be noted that the Law Commission had recommended that a provision by way of an exception should be made to the effect that the execution of a decree upon an application presented after the expiration of the period of 12 years, where the judgment-debtor has, by fraud or force prevented the execution of the decree at some time within 12 years immediately preceding the date of the application and simultaneously to delete section 48 of the CPC. Section 48 of the CPC has been deleted on 1/1/1964 but article 136 makes no exception so as to extend the period of

limitation on account of fraud or force due to which the execution of the decree was prevented at some time. Article 136 has already been reproduced in its entirety in the earlier part of the judgment. Counsel for the petitioners taking clue from the observations in the judgment of the Rajasthan High Court would contend that the petitioners were misled on account of the fact that the respondent had filed appeal against the decree and which appeal was pending before the appellate courts. And it is only on dismissal of the second appeal by this court, the petitioners could have taken recourse to instituting execution proceedings. I find no substance in this argument. This argument cannot be countenanced in view of the mandatory provisions of Article 136 of the Limitation Act. In the case of ***P.K. Kutty Anuja Raja' s case (supra),*** the Apex Court has observed that the knowledge of mistake of law cannot be the basis to extend the period of limitation. It is well settled position that ignorance of law is no excuse. There can be no ignorance of fact in the present case. The petitioners had complete knowledge about the nature of decree having been passed on 9/2/1981. The law clearly postulates that the decree once passed becomes enforceable unless it is stayed by the competent court. In the present case, there was no stay to the decree at any point of time. Thus understood, in my opinion, the decision of the Rajasthan High Court pressed into service will be of no avail to the petitioners.

27. In view of the above, I have no hesitation in concluding that the conclusion reached by the executing court that the execution proceeding

taken out by the petitioners was barred by law of limitation is unassailable.

28. The revision is dismissed with costs. It is however, clarified that it will be open to the petitioners to withdraw the amount deposited by them along with accrued interest, if any.

[A.M. KHANWILKAR, J.]